DOCUMENT RESUME

ED 327 748 CG 023 052

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TITLE A Guide to the Employment Section of the Americans with Disabilities Act 1990.
PUB DATE 25 Jan 91
NOTE 20p.
PUB TYPE Information Analyses (070)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Civil Rights Legislation; *Compliance (Legal); *Disabilities; *Equal Opportunities (Jobs); Equal Protection; *Federal Legislation; *Handicap Discrimination; Personnel Integration; Personnel Policy; Personnel Selection; Social Bias; Social Discrimination
IDENTIFIERS *Americans with Disabilities Act 1990

ABSTRACT

The Americans with Disabilities Act, signed into law July 26, 1990, has been heralded across the nation as a triumph for the 43 million Americans with disabilities. This document provides a guide to Title 1 of this Act, which forbids employers with 15 or more employees from discriminating against a qualified individual with a disability in job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; and other terms, conditions, and privileges. A list of discriminatory acts by employers under the law is provided, along with regulations regarding physical examinations, reasonable accommodation, and undue hardship. Enforcement is in accordance with the powers, remedies, and procedures set forth in the Civil Rights Act of 1964, and these regulations are enforced by the Equal Employment Opportunity Commission. A question-and-answer section concludes the document, and resources are included. (TE)

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A GUIDE TO THE EMPLOYMENT SECTION OF THE AMERICANS WITH DISABILITIES ACT 1990

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January 25, 1991

CG0230052

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AMERICANS WITH DISABILITIES ACT LEGISLATION:

Introduction

The Americans's with Disabilities Act was signed into law July 26, 1990. The act has been referred to as the Civil Rights Act for the Handicapped and the Emancipation Proclamation for Persons with Disabilities. It has been heralded across the nation as a triumph for the 43 million Americans with disabilites.

President George Bush (1990) said on signing the act into law that:

> although the Civil Rights Act of 1964 righted many wrongs the "stark fact remained that people with disabilities were still victims of segregation and discrimination, and this was intolerable. Today's legislation brings us closer to that day when no American will ever again be deprived of their basic guarantee of life, liberty, and the pursuit of happiness."

Nell Carney, Director of the Rehabilitation Services Administration, (1990) also stated that passage of the ADA provides an unique opportunity for rehabilitation professionals to assist in the total integration of persons

with disabilites into society. She indicated that the ADA further requires that persons with disabilities become even more "responsible, competitive, educated, and informed" (Carney, 1990). Therefore, the ADA forces persons with disabling conditions to become truly equal with the nondisabled population.

Mary Jane Owen (1990) said that "persons with disabilites are now normalized." She further remarked that the "alms giving of the past" is now being replaced by a new responsiblity for persons with disabiling conditions (Owen, 1990).

The law states that discrimination against persons with disabilities has occurred in the following areas: "(a) employment, (b) housing, (c) public accomodations, (d) education, (e) transportation, (f) communication, (g) recreation, (g) institutionalization, (h) health services, (i) voting, and (j) access to public services."

There are five major divisions in the act. These areas are as follows:

Title 1: Employment

Title 2: Public Services

Title 3: Public Accomodations and Services Operated by Private Entities

Title 4: Telecommunications

Title 5: Miscellaneous Provisions

LEGAL DEFINITIONS

Disability is defined as:

A. A physical or mental impairment that substantially limits one or more of the major life activities of the individual.

B. Having a record of such an impairment; or

C. Being regarded as having such an impairment

Qualified Individual with a Disability is defined as:

An individual with a disability who, with or without reasonable accomodation, can perform the essential functions of the employment position that the individual holds or desires to hold.

TITLE I: EMPLOYMENT

The employment section of the law includes businesses employing 15 or more persons. For the first two years after the act becomes law, employers who have 25 or more employees will be covered by the act. In four years, coverage will include employers with 15 or more employees.

The employers covered must not discriminate against a qualified individual with a disability in job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; and, other terms, conditions, and privileges. Employers may not discriminate against a qualified applicant or employee because of the known disability of an individual with whom the applicant or employee is known to have a relationship or close association. Furthermore, during the interview process the employer may not inquire about the nature of the applicant's disabling condition. Only inquiries as to whether the applicant is able to perform job tasks are permitted.

<u>Discrimination constitues:</u>

A. Classifying job applicants because of a disability when their classification adversely affects the applicant's opportunities or status;

B. Using tests, standards, or other criteria for employment that may exclude from consideration persons with disabilities;

C. Denying equal job or benefits to an individual with a disability solely on the basis of the disability;

D. Not making reasonable accomodation to the known limitations associated with the individual's disability, except where undue hardship would be imposed;

E. Denying employment because reasonable accomodation would be needed; and,

F. Failing to provide accomodation for the known limitations of an individual with a disability on tests used as criteria for employment;

Physical Examinations:

A. Pre-employment physical examinations are illegal.

B. Post-offer employment physicals may be given only if required of all workers.

C. Information from physical examinations is confidential and available only to the following specified persons: (1) supervisors and managers, to clarify necessary accomodations; (2) first aid and safety personnel, if the

employee's disability might necessitate emergency care; and (3) government officials investigating compliance with ADA.

Reasonable Accomodation includes:

A. Making existing facilities accessible to and usable by persons with disabilities,

B. Job restructuring,

C. Part-time or modified work schedules,

D. Reassignment to a vacant position,

E. Acquisition or modification of equipment or devices,

F. Appropriate adjustment or modification of examinations, training materials, or policies, and

G. The provision of qualified readers or interpreters

Undue Hardship

An action requiring significant difficulty or expense

Factors considered:

A. Nature and cost of accomodation

B. Financial resources of the individual facility involved and the effect of accomodation on expenses and resources, and

C. The overall financial resources of the covered entity if the facility is owned by a larger institution.

The law requires that enforcement of the act be in accordance with the powers, remedies and procedures set forth in the Civil Rights Act of 1964. The Equal Employment Opportunity Commission is entrusted with issuing and enforcing the regulations covering this act. The law requires that the regulations of this act be issued no less than one year from the signing of the act. Therefore, the official regulations will be ready for review in February and will be officially issued no later than July 26, 1991.

Questions and Answers

"Does the ADA require me to hire workers with disabilities?"

No. The ADA is not an affirmative action statute; however, it does require that one does not discriminate against qualified persons with disabilities in hiring practices.

"What if I have two applicants who are equally qualified and one of the applicants has a disability? Am I required to hire the applicant who has the disability?"

No. If the two applicants are equally qualified, one must make the selection on whatever documented and consistent criteria that is used when choosing between two equally qualified nondisabled applicants. However, the existence of a disability cannot be used as a criterion for not choosing the applicant with a disability.

"Can I ask a job applicant if he or she has a disability?"

No. Once the applicant has broached the topic of disability, then one may ask if he or she needs accomodation to perform the essential functions of the job.

"What if an applicant has a hidden disability, such as diabetes or a learning disability?"

It is then the responsibility of the applicant to inform the employer of the disability, if the applicant wishes to be considered for job accomodation. The applicant may be required to provide documentation of the disability and the limitations associated with the disability.

"What if I hire someone with a hidden disability who does not inform me of the disabilty until after employment has been accepted?"

Once the employee informs the employer of the disability, the employer is required to make reasonable accomodation. If the employee is found to be unable to perform the essential functions of the job with accomodation, then the employer has no obligation to keep that person in his/her employ.

"May I ask job applicants to take preemployment physical examinations?"

No. Once an offer of employment has been made, a physical examination may be required only if one is required of all persons to whom employment is offered.

"What are my obligations if this post-offer physical indicates the existence of a disability?"

First one must attempt to provide accomodations for the limitations of this disability. If the limitations prevent

the individual from performing the essential functions of the job with accomodation, then one may withdraw the offer of employment.

"If an employee becomes disabled and can no longer perform the duties of his or her position with accomodation, must I create a new position for that person?"

No. The ADA does not require the creation of a new position as an accomodation. This legislation does, however, indicate that reassignment to a vacant position for which the individual is qualified would be a reasonable accomodation.

"May I ask applicants to take aptitude or academic tests prior to an offer of employment?"

Yes. However, one must be able to prove that the content of the test accurately measures the essential functions of the job for which the individual is applying. (i.e., cannot require a test of reading if the reading is not an essential function of the job)

"Can I continue to require drug screening?"

Yes. The ADA does not cover persons who are current users of drugs or alcohol. However, persons who are recovering alcoholics or addicts are protected from discrimination.

"What is the most important source of documentation for me in showing that I am in compliance with the ADA?"

Complete and accurate job descriptions. The job description serves as a written record of essential functions of a job and serves as the basis for determining whether reasonable accomodation can or cannot be provided.

What information should be included in my job descriptions?"

Job descriptions should:

1. List the responsibilities of the position.

2. List the minimum requirements (essential functions) needed to perform the responsibilities of the job competently. These should include:

   A. Physical requirements of the job (i.e., lifting over 50 lbs., standing for 6 hours per day, etc.)

   B. Logistical information (i.e., temperatures often exceed 90 degrees, dusty conditions, work outside in all types of weather, etc.)

   C. Education/experience (i.e., a minimum of a high school diploma, three years of supervisory experience)

D. The stress factor of the job (i.e., high pressure job requiring that deadlines be met without exception)

E. Hours of work (i.e., often requires extended work days with occasional weekends)

"How can I write a job description that accurately reflects the essential functions of the job?"

By conducting job analysis, including:

1. Interviewing and observing persons currently performing the job.
2. Involving someone from outside the direct chain of command.
3. Listing only true job requirements.
4. Reviewing and updating periodically.

How might I use the job description effectively?"

Make sure that job applicants are aware of the essential functions of the job by:

1. Showing the job description to the applicant.

2. Asking the applicant how performance of the essential functions of the job might be achieved by accomodation.

3. Asking the applicant if he or she can perform the essential functions described in the job description

4. Reviewing the job description during an observation of the performance of the job

"If involved in litigation, what documentation do I need to show that that reasonable accommodation could not be achieved?"

The following are necessary:

1. The job description of the position in question.

2. A written review of the area in which the job is located (i.e., physical location, existing barriers, etc.)

3. An analysis of proposed accommodations to include:

   A. Cost of the proposed accommodation.

   B. The effect that proposed accommodations would have on business operation.

C. The effect that proposed accommodations would have on the job in question.

D. The effect that proposed accommodations would have on other employees.

E. Data and opinions about any architectural/structural implications of the proposed accommodations.

F. Any other expert data.

"What are some of the mistakes that employers are likely to make that could result in litigation?"

Some common mistakes include:

1. Assuming that certain jobs cannot be performed by people who have specific types of disabilities without considering how successful performance might be achieved with accommodation.

2. Failing to document the essential functions of a job.

3. Failing to document how reasonable accommodation could not be achieved.

4. Exaggerating the cost of possible accommodations.

5. Failing to ask the applicant if she or her can perform the essential functions of the job.

6. Failing to consider more than one possible accommodation.

"What agency will be responsible for enforcement of the ADA?"

The Equal Employment Opportunity Commission (EEOC). The EEOC will be issuing its final regulations regarding compliance during the summer of 1991. They will also publish a technical assistance manual within 6 months after they regulations are in place.

RESOURCES

For information about reasonable accommodation:

Write for the booklet Employers are asking about accommodating workers with disabilities. The President's Committee on Employment of the Handicapped, Washington, DC 20036

Call the Job Accommodation Network: 1-800-526-7234

Contact your local Office of Vocational Rehabilitation

For information about accessibility:

Write for the booklet Employers are asking about making the workplace accessible to workers with disabilities. The President's Committee on Employment of the Handicapped, Washington, DC 20036

Write for the American National Standard A117.1-1986 Buildings and facilities-Providing accessibility and usability for physically handicapped people. American National Standards Inc., 1430 Broadway, New York, NY 10018

Contact you local Office of Vocational Rehabilitation and ask for a rehabilitation engineer to review your facility.

For information about compliance with the ADA:

Write: EEOC

1810 L Street NW

Washington, DC 20507

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